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Supreme Court of the United States

October Term, 1960

No. 849

JUAN GARCIA,

Petitioner,

vs.

THE ATCHISON, TOPEKA and SANTA FE RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

ROLANDO J. MATTEUCCI,
Counsel for Petitioner,
604 Simms Building,
Albuquerque, New Mexico.

AVELINO V. GUTIERREZ,
A. F. SCERESSE
Albuquerque, New Mexico,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, JUAN GARCIA, by his attorneys, respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court to review the judgment of the Supreme Court of New Mexico, entered in this cause on November 13, 1959.

OPINION BELOW

The opinion of the Supreme Court of the State of New Mexico is reported at 347 P 2d 1005 and a copy thereof is annexed hereto as Appendix A. No opinion was rendered by the Supreme Court of New Mexico in denying the Petition for Rehearing.

STATEMENT OF JURISDICTION

The order of the New Mexico Supreme Court, affirming judgment of the trial court, sought to be reviewed, was dated November 13, 1959, and entered on the same date (R-509).

The Petition for Rehearing was filed on December 3, 1959 (R-510) and denied by Order entered January 11, 1960 (R-511).

The jurisdiction of this Court is invoked under 45 U.S.C. Sec. 51, as amended.

QUESTIONS PRESENTED FOR REVIEW

Can the trial court properly direct a verdict for the respondent under the Federal Employers' Liability Act, holding as a matter of law that an injured employee was not within the scope of his employment, and thereby depriving him of right to a jury trial when the record shows that he was subject to call for work at any time of day or night, was living in railroad-furnished quarters, and was walking on railroad premises adjacent to the camp on his way to eat and purchase stationery when he was injured?

STATUTORY PROVISION INVOLVED

The following statutory provision is involved and the pertinent parts thereof are quoted herein as follows:

Federal Employers' Liability Act, 45 U.S.C., Sec. 51: "Every common carrier by railroad while engaged in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce,

* * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its * * * appliances, * * * track, roadbed, works, * * * or other equipment.

Any employee * * * any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce * * * shall be considered as entitled to the benefits of this chapter."

STATEMENT OF THE CASE

Petitioner filed suit against the respondent under the Federal Employers' Liability Act (R-10). He alleged injury by respondent while in the scope of his employment and on respondent's premises (R-10). The case was tried to the court and jury. At the conclusion of petitioner's case-in-chief, the trial court directed a verdict for respondent on the ground that petitioner was not acting within the scope of his employment (R-498).

Petitioner appealed this judgment to the Supreme Court of New Mexico (R-119). The New Mexico Supreme Court affirmed the judgment of the lower court (R-509). Petitioner's Motion for a re-hearing was denied (R-511).

A narrative statement of the evidence is as follows: Respondent hired petitioner to haul cement which was used to "shoot" under the tracks (R-183, 253). Respondent required petitioner to live in railroad box cars, known as bunk cars, on a railroad siding immediately adjacent to other tracks used by respondent's trains (R-159, 255). The camp was comprised of some twenty (20) cars (R-157), consisting of bunk cars, tool cars, mess hall and water car (R-253).

Petitioner and other employees were subject to call for work at any time of the day or night (R-182, 255). The town of Kiowa, Kansas, was located east of the camp and it was necessary to cross the tracks to go to town (R-158, 377). It was customary, with the knowledge of respondent, for the employees to take a short cut directly across the tracks to go to Kiowa (R-279, 428).

Petitioner and other employees were served three meals a day during work days and on Saturdays and Sundays they were furnished two meals each day, at 9:00 A. M. and 2:00 P. M. (R-159). Petitioner, on Saturday, June 5, 1954, about 2:00 P. M. (R-160), crossed between two cars of respondent's train adjacent to the camp site (R-161, 162), on his way to Kiowa to eat his noon meal and later his third meal and to buy stationery (R-160, 163, 224). His foot was caught in the coupling of the two cars and he suffered a severe and permanent injury thereto (R-234).

REASONS FOR ALLOWANCE OF THE WRIT

1. The decision of the New Mexico Supreme Court is contrary to the decisions of other Federal and State Courts.

The New Mexico Supreme Court based its decision entirely on *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wottle*, 1st Cir., 193 F. 2d 628 (1952). The opinions of the New Mexico Supreme Court in this case and the majority in the *Wottle* case give the Act a narrow and unduly restrictive construction. The vast majority of Federal and State Courts are in accord with the dissenting opinion of Judge Bratton in the *Wottle* case, giving the Act a broad and liberal interpretation in order to accomplish the humane purposes intended by Congress. *Atlantic Coast Line R. R.* v. *Meeks*, 30 Tenn. App. 520, 208 S. W. 2d 355 (1947) cer den 333 U.S. 827 (1948); *Mostyn* v. *Delaware, L. & W. R. Co.*

2 cir., 160 F. 2d 15 (1947); *Atlantic Coast Line R. Co.* v. *Smalls*, 4 Cir., 216 F. 2d 842 (1954); *Lukon* v. *Pennsylvania R. Co.*, 3 Cir., 131 F. 2d 327 (1942); *Casso* v. *Pennsylvania R. Co.*, 128 F. Supp. 909 (D-C Pa. 1954) 3 Cir., 219 F. 2d 303 (1955); *Brown* v. *Union Pac. R. Co.*, 235 P. 2d 506 (Utah, 1951); *Crecelius* v. *Chicago M. & St. P. Ry. Co.*, 284 Mo. 26, 223 S.W. 413 (1920); *Healy* v. *Pennsylvania R. Co.*, 3 Cir., 184 F. 2d 209 (1950); *Virginian Ry. Co.* v. *Early*, 4 Cir., 130 F. 2d 548 (1942); *Chicago, M., St. P. & P. R. Co.* v. *Kane*, 9 Cir., 33 F. 2d 866 (1929); *Brock* v. *Chicago, R. I. & P. Ry. Co.*, 305 Mo. 502, 266 S.W. 691 (1924).

We believe that the holding of the *Wottle* case has been overruled by this Court in *Atlantic Coast Line R. R.* v. *Stinson*, 264 Ala. 522, 88 So. 2d 189, 355 U.S. 62, reh den 355 U.S. 910, (1955). This case is more fully discussed below. But even before the *Stinson* decision, at least two courts analyzed the *Wottle* case as representing the conservative view in conflict with decisions from other circuits. *Casso* v. *Penn. R. Co.*, supra, 219 F. 2d 303 at p. 306; *Dolmage* v. *Chicago, R. I. & T. R. Co.*, 241 Minn. 243, 63 N.W. 2d 273 (1954) at p. 276.

Although we do not concede that the *Wottle* case is authority, the case at bar has a very important factual distinction. Petitioner was subject to call for work at any time of the day or night. There is nothing in the *Wottle* decision imposing this duty on Wottle. This one element was considered of major importance in *Casso* v. *Penn. R. Co.*, supra, and *Atlantic Coast Line R. R.* v. *Meeks*, supra.

Of great significance is that this Court granted certiorari in the *Wottle* case, 343 U.S. 963 (1952) and before the decision was rendered, the case was dismissed pursuant to stipulation of the parties. 344 U.S. 850 (1952).

2. The decision of the New Mexico Supreme Court is

contrary to this Court's decision in *Atlantic Coast Line R. R. v. Stinson*, supra.

The Alabama Supreme Court in reversing a jury verdict for Stinson, on the dual ground that it had not been shown what was the proximate cause of decedent's death nor that decedent was then in the course of his employment, stated at 88 So. 2d 189, p. 194.

> "We consider that in going to the diner Stinson was acting within the line and scope of his employment. His next duty would be to return from the diner to the engine. However, as we have pointed out, there was no evidence as to what happened after he left the diner and we can only speculate as to what proximately caused Stinson's death and if it was in the course of his employment, there being no duty of Stinson to perform which we can infer that he was doing when he was struck by the movement of the train."

This Court was of the opinion that Stinson was an employee intended to be covered by the Act and reversed the Alabama Court, stating that the evidence presented a jury question whether his death resulted in whole or in part from the negligence of the railroad.

The *Wottle* case, like the case at bar following it, was decided on the restricted basis that an extra gang laborer on his way to obtain food (and in petitioner's case also stationery) was on a private mission wholly unconnected and unrelated to his employment. Even on this narrow ground, such an employee, in quest of food for his sustenance and consequent fulfillment of his employer's work, should come within the purview of the Act. But the real fallacy in such rationale is the undue emphasis on the immediate purpose and state of mind of the employee at the moment of his injury, disregarding a consideration of all circumstances surrounding the relationship existing be-

tween the employee and his employer, as well as of the injury itself.

There was no proof of Stinson's purpose or state of mind at the moment he met his death, but he had taken a meal at the railroad diner shortly before he was killed and his body was found on railroad premises.

The holding in this case leaves no doubt that the *Wottle* case, supra, on which the New Mexico Supreme Court exclusively grounded its decision, has been overruled. And inexplicably, the New Mexico Supreme Court failed to cite or discuss this important case.

3. The trial court erred in directing a verdict for respondent at the conclusion of petitioner's case-in-chief, thereby depriving him of his right to a jury trial under the Federal Employers' Liability Act.

This Court, not long after the enactment of the Federal Employers' Liability Act in 1908, laid down the principle that the question of whether a claimant was an employee engaged in interstate commerce at the time of his injury was a question of fact for the jury's determination. *Pennsylvania Co.* v. *Donat*, 239 U.S. 50 (1915); *Southern Railway Co.* v. *Lloyd*, 239 U.S. 496 (1916); *Nor. Car. R. R. Co. v. Zachary*, 232 U.S. 248 (1914); *N. Y. Central R. Co.* v. *Marcone*, 281 U.S. 345 (1930).

In 1939 Congress amended the Act, eliminating the "moment of injury" test and bringing an employee within the protection of the Act "any part of whose duties shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce."

Since the scope of the Act was broadened, there is greater reason to include within it employees formerly al-

together excluded or other employees who in the circumstances of their injury were excluded under a narrow construction of the Act. The courts have held that when more than one inference can be drawn from the evidence, the question of scope of employment, or more correctly stated, whether acts were being performed which were a necessary incident of employment in the furtherance of commerce, is one for the jury. *Sullivan* v. *Matt*, 278 P. 2d 499 (Calif. 1955); *Brown* v. *Union Pac. R. Co.*, supra; *Healy* v. *Pennsylvania R. Co.*, supra; *Atlantic Coast Line R. R.* v. *Meeks*, supra.

From the following facts, fair-minded men could draw different inferences and find that petitioner was entitled to the benefits of the Act:

(1) Petitioner, for the benefit of the railroad, was recruited in New Mexico to work as an extra gang laborer in Kansas (R-156), and as a condition of his employment was furnished board and sleeping quarters on its work train. *Atlantic Coast Line R. R.* v. *Meeks* supra; *Mostyn* v. *Delaware, L. & R. Co.*, supra; *Rivera* v. *Atchison, T. & S. F. R. Co.*, 61 N.M. 314, 299 P. 2d 1090 (1956).

(2) He was subject to call for work at any time of the day or night. *Casso* v. *Penn. R. Co.*, supra; *Atlantic Coast L. R. R.* v. *Meeks*, supra.

(3) He was injured on railroad premises near the camp. *N. Y. Central R. R. Co.* v. *Marcone*, supra; *Casso* v. *Penn. R. Co.*, supra.

(4) He was going across the tracks at a point customarily crossed by employees, which practice was known to the employer. *Casso* v. *Penn. R. Co.*, supra; *Crecelius* v. *Chicago, M. & St. P. Ry. Co.*, supra; *Brock* v. *Chicago, Rock Island & Pacific Ry. Co.*, supra; *Lukon* v. *Penn. R. Co.*, supra.

(5) He was on his way to eat and purchase stationery, both of which acts were necessary incidents of his employment with the railroad. *Virginian Ry. Co.* v. *Early*, supra.

This Court has repeatedly stated in a number of recent cases that the jury plays a broad and important function in the determination of actions brought under the Act. It has emphasized that the right to jury trial is part and parcel of the remedy afforded railroad workers and that whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, the case should go to the jury. *Rogers* v. *Missouri P. R. Co.*, 352 U.S. 500 (1957); *Lavender* v. *Kurn*, 327 U.S. 645 (1946); *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U.S. 574 (1945); *Bailey* v. *Central Vermont R. Co.*, 319 U.S. 350 (1943); *Blair* v. *Baltimore & Ohio R. Co.*, 323 U.S. 600 (1945); *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1944); 69 Harvard Law Review 1-41.

The frequent deprivation to litigants of this right by lower courts was noted in the *Rogers* case, supra, 352 U.S. 500 at p. 501, which states that special and important reasons exist for the granting of certiorari in these cases to correct instances of improper administration of the Act and to prevent its errosion by narrow and niggardly construction.

The *Stinson* case, heretofore discussed, held an employee covered by the Act under facts which petitioner believes to be less favorable for such coverage than are present in his case. But he submits that, at the very least, he is entitled to a jury determination of this very important question.

CONCLUSION

It is respectfully submitted that the petition should be granted, and the Writ issue.

ROLANDO J. MATTEUCCI,
Counsel for Petitioner,
604 Simms Building,
Albuquerque, New Mexico.

AVELINO V. GUTIERREZ,
A. F. SCERESSE
Albuquerque, New Mexico,
Of Counsel.

APPENDIX A

IN THE

Supreme Court of the State of New Mexico

Filed November 13, 1959

JUAN GARCIA,
Plaintiff-Appellant,

vs.

No. 6529

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF VALENCIA COUNTY

McMANUS, JR., *Judge*

AVELINO V. GUTIERREZ
R. J. MATTEUCCI
A. F. SCERESSE
Albuquerque, New Mexico
Attorneys for Appellant

B. G. JOHNSON
R. G. COOPER
J. T. PAULANTIS
Albuquerque, New Mexico
Attorneys for Appellee

McGHEE, *Justice*.

This action was brought under the provisions of the Federal Employer's Liability Act, Title 45, U.S.C.A., Sec. 51, as amended, for damages for injuries allegedly caused by the negligence of appellee's servants.

At the conclusion of appellant's case-in-chief, the appellee moved for a directed verdict on the ground that the activities of appellant at the time of the injury were for a private purpose and were unconnected with his employment. The motion was granted by the trial court and it is from this ruling that the plaintiff appeals.

The appellant cites many cases as authority for the proposition that his employment was in furtherance of interstate commerce and the appellee concedes that the employment was such as to entitle appellant to the benefits of the Employer's Liability Act, supra, if he were acting within its scope.

Appellant is not covered by the act and his action must fail if his acts at the time of the injury were not necessarily incident to or an integral part of his employment but rather were undertaken for a private purpose having no causal relationship with his employment.

The crucial issue upon which this appeal turns then is whether or not the appellant was acting within the scope of his employment at the time he was injured.

The appellant was employed by the appellee as an extra gang laborer with a work crew engaged in maintaining appellee's tracks near Kiowa, Kansas. The men lived at the company work camp which was comprised of some 28 railroad cars spotted on a siding immediately adjacent to the other tracks used by appellee's train. The camp consisted of bunk cars in which the appellant and the other laborers slept, tool cars, and a mess hall and water car.

Appellant and the other laborers worked a five-day week with Saturday and Sunday off. They were, however, subject to call at any time in case of an emergency. The company furnished three meals a day during workdays and the morning and noon meals on Saturday and Sunday.

The town of Kiowa was located just east of the camp. There was a path or unimproved road west of and parallel to the tracks which led to the main crossing and then ran into Main Street in Kiowa. Rather than follow this road along the tracks and cross them at the prescribed crossing, it apparently was customary for employees going to Kiowa to cross the tracks directly on leaving the camp.

On the Saturday morning of the accident a train stopped on the tracks between the camp and Kiowa and was parked there. The accident giving rise to this cause of action occurred on the afternoon at about 2:00 p. m.

The appellant had left his bunk car with a companion intending to go to the mess car and eat lunch which was then being served. Before reaching the mess car, however, he changed his mind and decided to go into town to eat both his lunch and supper and to purchase some writing paper.

In order to cross the track in the customary place rather than at the main crossing it was necessary to go between the cars of the train which had stopped there that morning. As the appellant put his foot on the coupling connecting the two cars between which he was attempting to cross, the train moved closing the coupling on his foot and causing the injury here complained of.

Appellant relies heavily on Rivera v. Atchison, Topeka and Santa Fe Railway Co., 1956, 61 N.M. 314, 299 P. 2d 1090. There the appellant also was employed as an extra gang laborer repairing and maintaining tracks for the railroad. The company provided a camp with bunk cars and served meals. Up to this point the facts are identical with the case at bar. The important difference, however, concerns the circumstances of the injury.

Rivera was assaulted by hobos as he returned from the outside camp toilet. His injury was sustained while he was using the facilities provided by the company and its liability was based on a failure to provide a safe place to work. In our case the appellant was not using the camp facilities when injured. On the contrary, he had decided not

to use them and was leaving the premises for private purposes.

A case very similar to the case at bar is A. T. & S. F. Ry. Co. v. Wottle, 1952, 193 F. 2d 628, decided by the United States Court of Appeals, Tenth Circuit, on appeal from the Federal District Court in the New Mexico District.

The plaintiff was the administrator of the estate of Edward Begay, deceased, and this action also was brought under the provision of the Federal Employer's Liability Act. The decedent had been employed by the company as a section hand at a place called South Garcia, New Mexico. The company maintained a bunk house for the section men but required them to provide their own food and bedding.

The accident occurred on decedent's first day at work at this location. He spent the night before in the bunk house and reported to work the day of the accident. At the end of the day he was free to do what he pleased.

About an hour after quitting time the decedent and his bunk mate left in an automobile to get some groceries and to pick up some bedding. The usual route was to cross the railroad tracks at South Garcia. As they started across the track their automobile was struck by a diesel engine and both were killed.

The court said the following, in reversing the decision of the lower court:

> "The case said to be most like ours, and upon which appellee relies, is Mostyn v. Delaware, L. & W. R. Co., 2 Cir., 160 F. 2d 15, 17, where a casual laborer on the railroad was provided bed and board in bunk cars located on the tracks in connection with his employment. After the day's work, he went to town, but returned to sleep in the bunk cars. Driven out of the bunk cars because of the verminous condition of the bedding furnished by the Company, he was injured while sleeping by the side of the tracks. Deciding its case squarely on the facts presented, the court reasoned that 'when a

railroad provides shelter or food or both for its employees, and they are using the accommodations so provided to prepare themselves for their work, or to rest and recuperate, they must be regarded as in its employ"; and that inasmuch as he would have been covered while sleeping in a bunk house, he was likewise covered at the point where he had been driven in search of that which was provided. Applying that reasoning to our facts, it is argued that since, at the time of the accident the employee was in quest of groceries to bring back to the bunk house, to be used to sustain him for his interstate employment, his activity was necessarily incident to and a part of such employment.

"By this process of reasoning, the Act can be extended to cover all activities of an employee intended to sustain or prepare him for his interstate employment, regardless of time or place, or whether in pursuit of a benefit furnished by the employer or not. If we accept that conclusion there is no limitation upon the coverage so long as there is a possibility that the employee will return to his work-a-day duties on the morrow. Obviously, the legislation was not intended to go so far. The Company furnished the deceased a bunk for his bedding and a place to cook his food, but it furnished neither the bedding nor the food, and it was his sole responsibility to obtain it. When therefore, after his day's work, he set out in his own car to obtain groceries for himself, he was on a mission wholly unconnected and unrelated to his employment, and his injury while thus engaged cannot be said to be in commerce within the meaning of the Act. Cf. Quirk v. New York C. & St. L. R. Co., supra (7 Cir., 189 F. 2d 97)"

We think the situations of the decedent in the Woftle case and the appellant here are parallel. Both were on missions wholly unconnected and unrelated to their employment. Consequently, neither was within the provisions of the Federal Employer's Liability Act. The fact that appellant would have had to leave the camp to obtain the evening

meal even if he had stayed for the noon meals does not alter appellant's position. This merely makes the Wottle case more analogous to his circumstances. Nor can it be said that merely because, due to an emergency, appellant might be called at a time outside of working hours that he was not free to go as he pleased after working hours.

Thus even considering the evidence in the aspect most favorable to the appellant and disregarding all unfavorable evidence and inferences, as we must when the trial court directs a verdict, Morris v. Cartwright, 1953, 57 N.M. 328, 258 P. 2d 719, we find that the court's action was proper and no error was committed.

The judgment will be affirmed. IT IS SO ORDERED.

S/ JAMES B. McGHEE

WE CONCUR :

S/ EUGENE D. LUJAN, C.J.
S/ J. C. COMPTON, J.
S/ DAVID W. CARMODY, J.
S/ IRWIN S. MOISE, J.

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

BRYAN G. JOHNSON
RICHARD G. COOPER
JAMES T. PAULANTIS
1220 Simms Building
Albuquerque, New Mexico

STARR THOMAS
Railway Exchange Building
Chicago 4, Illinois

Attorneys for Respondent

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Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of the State of New Mexico sustaining the decision of the District Court of Valencia County, New Mexico, is reported at 347 P. 2d 1005, a copy of which is annexed to petitioner's brief as Appendix A.

JURISDICTION

The judgment of the District Court, Valencia County, New Mexico, was entered on September 30, 1957. Order of the Supreme Court of the State of New Mexico affirm-

ing judgment of the trial court was entered November 13, 1959. A petition for rehearing was denied January 11, 1960. The petition for a Writ of Certiorari was filed April 11, 1960. The jurisdiction of this court is improperly sought by petitioner to be invoked under TITLE 45, SEC. 51, U.S.C.A., commonly known as the Federal Employers' Liability Act.

QUESTION PRESENTED

Whether the court has jurisdiction under the Federal Employers' Liability Act for a personal injury when:

(1) Employer railroad had connected to petitioner's living quarters a mess hall, where meals were available, and a commissary car, where stationery could be purchased, and petitioner without justification refused to avail himself of these privileges;

(2) Petitioner was injured at a time when he was not on duty and when he was free to go where he pleased, being subject to call only in case of emergency and if he were available;

(3) Petitioner was injured while traveling on his own time from the living quarters to town to obtain stationery for himself, an act which was not a necessary incident to his employment.

STATUTE INVOLVED

TITLE 45, U.S.C.A., SEC. 51 provides in pertinent part as follows:

"'Any employee *** any part of whose duties as such employee shall be the furtherance of interstate or

foreign commerce; or shall, in any way directly and substantially, affect such commerce *** shall be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT OF THE CASE

Petitioner resided in Albuquerque, New Mexico, when employed to work at Kiowa, Kansas, as a laborer where he was furnished living quarters (R. 156-157), together with eating (R. 159) as well as commissary facilities where stationery and other items were available for purchase by the petitioner (R. 365). He worked eight hours a day, five days a week, and could be called for extra work only in case of emergency and if he were available (R. 200).

Living quarters furnished were bunk cars, and attached thereto was a mess hall where three meals a day were served five days a week, and on the remaining two days only two meals were served, at 9:00 A.M. and at 2:00 P.M. (R. 159). Petitioner paid for the meals served whether he ate them or not (R. 363).

On Saturday, a day on which he was not working and while he was free to come and go as he pleased (R. 201), petitioner left his quarters, walked past the mess car at a time when the afternoon meal was being served (R. 160). He did not eat as he was not hungry (R. 212), but started for Kiowa, Kansas, to buy stationery (R. 210). In leaving the work train for town he cut across the railroad tracks and climbed between freight cars of a train stopped on a nearby track. While standing on the coupler the train was moved and petitioner's foot was injured (R. 163). A safe route from the living quarters to the main street into town was provided by the employer (R. 191, 193), and it was

not necessary for the petitioner to travel the route he chose to Kiowa, Kansas, for a meal or for stationery, as both of the latter were made available by the employer at the work train. Also petitioner, in voluntarily leaving the premises, gave no indication as to when he might return, as he was off duty the following day, which was Sunday.

The two courts below agree as to all material facts (R. 498 — Petitioner's Appendix A, 2, 3, 9).

ARGUMENT

Petitioner throughout his appeal to the Supreme Court of the State of New Mexico, and here, ignores or refuses to acknowledge the fact that he was subject to call for work only in cases of emergency if he were available and that the very items that he was going to town to purchase were made available by the employer in railroad cars adjacent and connected to the living quarters. At the time of injury petitioner was not using the facilities furnished, but left the premises for private purposes at a time when he was free to go where he pleased. In voluntarily leaving the work train he chose his destination and route of travel, and at the time of injury was not in the performance of any of the duties as an employee of the railroad.

On the basis of the facts in this case there is no conflict in the decisions cited by the petitioner, and the facts as shown, namely, that the petitioner refused to accept meals or purchase stationery which was available adjacent to his living quarters, will affect few, if any, other litigants. This case is not weighed with sufficient gravity and general importance in order to secure uniformity of decisions.

Cases cited in support of the petition when limited to the question presented are readily distinguishable.

Mostyn v. Delaware, L. & W. R. Co., 2 Cir., 160 F. 2d 15

(Injured while using accommodations provided by railroad to prepare for work or rest and recreation).

Atlantic Coast Line R. Co. v. Smalls, 4 Cir., 216 F. 2d 842

(Injured while attending safety meeting at request of employer who furnished transportation).

Atlantic Coast Line R. R. v. Meeks, 208 S.W. 2d 355

(Injured by exploding lamp in quarters furnished by railroad).

Casso v. Penn. R. Co., 128 F. Supp. 909; 3 Cir., 219 F. 2d 303

(Injured while on premises when on 24-hour duty).

Brown v. Union Pac. R. Co., 235 P. 2d 506

(Injured while enroute to another job while being paid travel time).

Healy v. Penn. R. Co., 3 Cir., 184 F. 2d 209

(Killed while attending war bond rally when employee instructed as to time and place and paid for attending).

Nor. Car. R. R. Co. v. Zachary, 232 U.S. 248

Virginian Ry. Co. v. Early, 4 Cir., 130 F. 2d 548

Chicago, M., St. P. & P. R. Co. v. Kane, 9 Cir., 33 F. 2d 866

Brock v. Chicago R. I. & P. Ry. Co., 266 S.W. 691

(Temporary stoppage of work for purposes necessarily incident to life).

Southern Railway Co. v. Lloyd, 239 U.S. 496

Nor. Car. R. R. Co. v. Zachary, 232 U.S. 248

N. Y. Central R. R. Co. v. Marcone, 281 U.S. 345

Lavender v. Kurn, 327 U.S. 645

Bailey v. Central Vermont R. Co., 319 U.S. 350

Grecelius v. Chicago M. & St. P. Ry. Co., 223 S.W. 413

(Killed or injured while working on an engine or in yards).

Other cases cited in the petition are not applicable, as they deal with negligence, which is not the question presented.

The decision of the Supreme Court of New Mexico was not, as contended by petitioner, entirely based upon *Atchison, T. & S. F. R. Co. v. Wottle*, 10 Cir., 193 F. 2d 628. This case has never been overruled nor is it inconsistent with the cases cited by petitioner, but when the facts and questions presented in the cited cases are construed they lend support to the Wottle case and collectively show, as stated in *Quirk v. New York, C. & St. L. R. Co.*, 7 Cir., 189 F. 2d 97:

> "* * * there is a point beyond which its application must be denied."

This decision was augmented by the Wottle case when the court stated, at page 630:

> "But, given its most liberal interpretation, the Act cannot be extended to cover activities not necessarily incident to or an integral part of employment in interstate commerce. It obviously does not cover activities

undertaken by an employee for a private purpose and having no causal relationship with his employment. Quirk v. New York C. & St. L. R. Co., 7 Cir., 189 F. 2d 97. The difficulty arises, as always, in drawing the dividing line in the twilight zone. Adjudicated cases are helpful only as factual analogies."

Here there is no conflicting evidence and only one possible inference could be drawn by a jury. Therefore, the trial court properly held as a matter of law that the Act was without application, and since the two courts below agree as to the material facts without conflict, this court will consider the facts only so far as is needful to pass on a question of law. *Risty v. Chicago, R. I. & P. Ry. Co.*, 270 U.S. 378. Thus the facts, being as stated, present only a question of law which was properly resolved by the courts below.

CONCLUSION

The decision below was clearly correct. We respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

BRYAN G. JOHNSON
RICHARD G. COOPER
JAMES T. PAULANTIS
1220 Simms Building
Albuquerque, New Mexico

STARR THOMAS
Railway Exchange Building
Chicago 4, Illinois

Attorneys for Respondent